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Supreme Court, U.S.
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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

JESSE CAMPOS, *ET AL.*,

Petitioners,

v.

THE CITY OF HOUSTON, *ET AL.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below err in allowing the city to sue its own minority citizens in a local district court, thereby circumventing the preclearance process of section 5 of the Voting Rights Act of 1965, as amended, and the case or controversy requirement of the Constitution?

2. Did the courts below err in not holding as a matter of law that it is inconsistent with section 5 of the Voting Rights Act of 1965, as amended, for an election to be held under an interim plan to which the Attorney General has objected when a precleared plan is available?

PARTIES

The following were parties in the courts below:

Jesse Campos;
W. R. (Resendes) Morris; and
The Mexican American Bar Association
of the City of Houston,

Plaintiffs-Appellants;

The City of Houston, Texas;
Kathryn Whitmire, Mayor;
City Council Members:
Jim Greenwood;
Eleanor Tinsley;
Sheila Jackson Lee;
Beverly Clark;
Margarette Robinson;
Larry McKaskle;
Ernest McGowen, Sr.;
Vince Ryan;
Ben T. Reyes;
Dale M. Gorczynski;
Al Calloway;
Christin Hartung;
John Goodner; and
Frank O. Mancuso,

Defendants-Appellees.

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OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 968 F.2d 446 and reprinted in the Appendix at pages A-1 to A-15. The order of the Fifth Circuit denying rehearing en banc is reported at 966 F.2d 674. The order of the United States District Court for the Southern District of Texas is reported at 776 F. Supp. 304 and reprinted in the Appendix at pages A-16 to A-27.

JURISDICTION

The decision for which review is sought was entered by the appeals court on July 31, 1991.[1] App. at A-1. Rehearing en banc had already been denied on June 1, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which is reprinted in the Appendix, at pages A-28 to A-29.

STATEMENT OF THE CASE

At stake in this case is whether the Voting Rights Act should be preserved in the manner Congress intended or be undermined by political machinations. Specifically, the issue is whether the City of Houston's suit against its Hispanic citizens to implement a redistricting plan objected to by the Attorney General violates the Voting Rights Act.

In 1979, the City of Houston adopted a city council system consisting of fifteen members, including the mayor. All fifteen members serve concurrent two-year terms and

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[1] This opinion substituted for a previous opinion issued on May 1, 1992, and reported at 960 F.2d 26.

are elected in November of odd years. Nine of these councilmembers are elected from single-member districts; five members are elected at-large; the mayor is also elected at-large. App. at A-2.

In April 1991, the petitioners, Hispanic registered voters in the city and the Houston Mexican American Bar Association, brought a suit [hereinafter the *Campos* litigation] against the City of Houston in the United States District Court for the Southern District of Texas seeking a permanent injunction prohibiting city council elections on the grounds that the council's at-large seats diluted Hispanic voting strength in violation of section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Fourteenth Amendment to the United States Constitution. App. at A-3. At the time there was only one Hispanic councilmember in Houston even though Hispanics comprised 27.6 percent of the city's population.

The petitioners' suit contained neither a claim under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, nor a claim that the single-member seats violated the Constitution's one-person, one-vote requirement.

On June 5, 1991, the city passed a redistricting plan for the nine single-member seats based on 1990 census data to correct for population changes in the old single-member districts. The at-large seats remained unchanged. On July 9, the city submitted this new plan to the United States Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. After several responses to the Attorney General's request for more information, the city finally completed its submission on September 27. App. at A-3 to A-4.

On October 4, 1991, the Attorney General interposed a timely objection to the city's redistricting plan under section 5 of the Voting Rights Act. App. at A-4.

If the city wanted to pursue its plan, it should have brought a declaratory judgment action in the United States District Court for the District of Columbia pursuant to section 5. Instead, on October 7, the city filed a motion for leave to file a supplemental counterclaim against its own Hispanic citizens in the section 2 *Campos* litigation in the local district court. This counterclaim requested that the court order the city to use the plan to which the Attorney General objected on an interim basis for the 1991 election.[2] In order to accomplish this goal, the city also requested that the court issue a declaratory judgment regarding the constitutionality of the old plan.[3] App. at A-4.

On October 11, in another attempt to implement a redistricting scheme, the city submitted a different apportionment plan for the nine single-member districts to the Attorney General for preclearance. The following day, the Attorney General precleared the city's reworked plan.

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[2] On October 10, the city amended its counterclaim to request only the use of "an interim plan" rather than specifying the plan objected to by the Attorney General. (City of Houston's First Amended Supplemental Counterclaim at 6.)

[3] Because of the Attorney General's objection to the city's redistricting plan, the old 1979 plan remained in place. *See City of Rome v. United States*, 446 U.S. 156, 182-83 (1980). In order to implement on an interim basis the plan to which the Attorney General objected, the city first needed to have the old plan declared unconstitutional. Such a declaration would leave the city with no plan at all and empower the court to implement an interim plan.

App. at A-5. Thus, three possible plans were before the district court: (1) the plan passed in 1979; (2) the plan to which the Attorney General objected; and (3) the plan that the Attorney General precleared.

After receiving notification of the Attorney General's preclearance action, the district court enjoined the city from using the 1979 plan. Rather than implementing the newly precleared plan #3, however, the court ordered that the city use plan #2 as an interim plan for the 1991 election, even though the Attorney General had objected to the plan. App. at A-27.

On October 16, the petitioners sought a stay, which the district court denied the following day. On October 24, the Fifth Circuit Court of Appeals also denied the stay. Finally, on October 29, Justice Scalia, acting as the Circuit Justice for the Fifth Circuit, denied the stay. App. at A-6.

Meanwhile, on October 17, the United States, which participated in this litigation as an *amicus* on the side of the petitioners but was never a party in the *Campos* litigation and thus not bound by the decision, filed an enforcement action under section 5 of the Voting Rights Act seeking to enjoin the election. *United States v. City of Houston*, No. 91-3076 (S.D. Tex. filed Oct. 17, 1991) (three-judge court). A three-judge panel refused to grant the injunction on October 29.[4] App. at A-6. The election was held on November 5, 1991.

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[4] Since the Justice Department's suit was filed under section 5, a three-judge panel was required. *E.g., Allen v. State Board of Elections*, 393 U.S. 544, 560-63 (1969).

The petitioners appealed the district court's order in the *Campos* litigation to the Court of Appeals for the Fifth Circuit, the primary argument being that the district court lacked jurisdiction to hear the city's counterclaim. On July 31, 1992, the appeals court ruled that the district court had jurisdiction to approve an interim plan, but had abused its discretion in this situation by not choosing the precleared plan. App. at A-13.[5]

REASONS FOR GRANTING THE PETITION

Section 5 of the Voting Rights Act of 1965, as amended, states that no covered jurisdiction, such as Houston, "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without receiving approval of the change through a declaratory judgment action in the District Court for the District of Columbia or

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[5] This opinion substituted for an opinion the Fifth Circuit originally issued on May 1, 1992. In its earlier opinion, the appeals court stated: "Because the remedy sought by the City and implemented by the district court effectively circumvented the requirements of Section 5, we hold that the district court exceeded its authority.... [W]hen the Attorney General has interposed a timely objection under Section 5, only a court with jurisdiction to resolve actions under Section 5 has the power to order that elections be conducted under that plan." 960 F.2d 26, 30-31 (5th Cir. 1992) (withdrawn). Why the appeals court, on its own motion, withdrew the May 1 opinion and substituted the July 31 opinion that reaches a contrary conclusion is a mystery.

preclearance from the Attorney General.[6] 42 U.S.C. § 1973c (emphasis added).

In keeping with congressional intent, this Court has repeatedly held that reapportionment plans of covered jurisdictions must be approved by the Attorney General or by the District of Columbia District Court. *E.g., United Jewish Organizations v. Carey*, 430 U.S. 144, 157 (1977); *Georgia v. United States*, 411 U.S. 526 (1973).

The Fifth Circuit's decision, however, gives local district courts authority to implement voting plans through a claim by a covered jurisdiction against its minority citizens. Because this tack is contrary to the purpose of the Voting Rights Act and established precedent, the petition for a writ of certiorari should be granted.

I. THE COURTS BELOW MISINTERPRETED THE SCOPE OF THE COVERAGE OF SECTION 5

In allowing the City of Houston to ignore established preclearance procedures under section 5 of the Voting Rights Act, the courts below eviscerated the protections the Act affords citizens in covered jurisdictions. When Congress passed the Voting Rights Act it meant to preclude evasions such as those used by the city to implement its chosen plan.

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[6] The broad scope of section 5 was apparent at the time of passage of the Voting Rights Act. *See Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 60-62 (1965) (testimony of Attorney General Katzenbach).

Congress has declared its "objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975). In fact, Congress specifically denied local district courts jurisdiction over declaratory judgment claims brought by covered jurisdictions pursuant to section 5. 42 U.S.C. § 1973l(b) (1988). Congress was concerned that local district courts would look more favorably on governmental entities than on minority citizens. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 58-59 (1982).[7] Moreover, this preclearance system allows the District of Columbia District Court to develop expertise in its section 5 determinations and encourages consistent decisions across disparate regions. Thus, while local district courts have jurisdiction over section 2 suits, for example, only the District of Columbia District Court can decide whether or not a plan can be implemented under section 5.

To be sure, local district courts do have jurisdiction over some section 5 cases. In this regard, this Court has drawn a clarifying distinction between "coverage" and "substantive" questions. *Allen v. State Board of Elections*, 393 U.S. 544, 559 (1969); *see also United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977) (per curiam). Private plaintiffs can bring declaratory judgment actions concerning whether a new procedure is subject to section 5 -- a coverage question -- in a district court. *Allen*, 393 U.S. at 560.

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[7] The Senate Report is an "authoritative source" in ascertaining legislative purpose. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

In substantive cases involving whether a voting provision is discriminatory under section 5, however, only the District of Columbia District Court can hear a covered jurisdiction's declaratory judgment action. *Id.* at 558-59. In *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982), this Court reversed the Mississippi Supreme Court's decision to allow an election to be held under a plan to which the Attorney General objected, holding that when an election change is covered by section 5, "courts may not further implement that change until the parties comply with § 5." Yet this is exactly what the district court did in *Campos*.

Rather than comply with section 5, the city created its own emergency in order to implement an interim plan. As long as plan #1 was in effect, the city could only implement a precleared plan. Any voter could have brought suit to enjoin the city from using an unprecleared plan. *Clark v. Roemer*, 111 S.Ct. 2096, 2101 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) (per curiam); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

By asking for and receiving a declaratory judgment that plan #1 was unconstitutional, the city created a situation in which some plan needed to be implemented. Rather than the usual situation where voters challenge a plan's legality, the city itself did so. If it had not, the city could have used plan #1 in the 1991 elections. By deciding not to use the old plan, the city itself created the opening for an interim plan to be ordered by the district court. The city blatantly ignored the Voting Rights Act's mandate that covered jurisdictions bring declaratory judgment actions for approval of voting plans in the District Court for the District of Columbia.

The city's circumventive action violates the Voting Rights Act. As this Court has recognized, Congress was aware that covered jurisdictions had used "the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination" and "might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *see also* H. Rep. No. 196, 94th Cong., 1st Sess. 8 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 15 (1975).

When Congress extended the Voting Rights Act for the first time, it specifically recognized the importance of section 5 in preventing "new subterfuges." H. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969).

Congress further expressed its confidence in the preclearance procedures when the Voting Rights Act was amended in 1975. The Senate Report states that section 5 ensures that "progress shall not be destroyed through new procedures and techniques." S. Rep. No. 295, 94th Cong., 1st Sess. 19 (1975); *see also* H. Rep. No. 196, 94th Cong., 1st Sess. 11 (1975).

In accordance with such explicit congressional intent, this Court has interpreted the preclearance provisions as having a "prophylactic purpose." *McCain v. Lybrand*, 465 U.S. 236, 246 (1984). This Court has also declared that it is a "well-settled rule that § 5 is to be given a broad construction." *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981). Congress itself has endorsed this Court's "broad interpretations" of section 5. H. Rep. No. 196, 94th Cong., 1st Sess. 9 (1975); S. Rep. No. 295, 94th Cong., 1st Sess.

16 (1975).

In addition to avoiding the District of Columbia District Court, the city also evaded the mandate of the Voting Rights Act that all declaratory judgments by covered jurisdictions be brought against the United States. The correct defendant in voting rights cases is the United States, not individual voters. *See, e.g., Voting Rights: Hearings Before Subcommittee No. 5 of the House Judiciary Comm.*, 89th Cong., 1st Sess. 90-91 (1965) (testimony of Attorney General Katzenbach). In *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), this Court made no mention of individual defendants in voting rights cases, concluding that a covered jurisdiction "wishing to make use of a recent amendment to its voting laws ... has a concrete and immediate 'controversy' with the Federal Government." The broad scope of section 5 prohibits the city from choosing to sue its minority citizens rather than the United States.

By avoiding bringing its suit in the District of Columbia District Court against the federal government, the city subverted the purpose of the Voting Rights Act because the counterclaim did not bind all interested parties. Under this analysis, the counterclaim was improper because the only people it bound were those Hispanic citizens before the court. Thus, the Attorney General's office brought its own section 5 enforcement suit against the city.[8] *United States v. City of Houston*, No. 91-3076 (S.D. Tex. filed Oct. 17, 1991) (three-judge court). The city's evasion of section 5 preclearance standards defeated

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[8] Theoretically, any Houston voter could have brought a similar lawsuit since only the Hispanic parties before the court were bound.

the structuring purpose of the Voting Rights Act by creating more litigation. The Act was meant to avoid such multiple lawsuits by limiting preclearance cases to the District of Columbia District Court with the United States as the defendant.

Through designating appropriate courts, parties, and procedures, the preclearance system harmonizes what would otherwise be disparate responses to the demands of the Voting Rights Act; it brings order to the process. Any covered jurisdiction interested in circumventing preclearance requirements can now use the *Campos* litigation as a blueprint. This Court must foreclose the use of the City of Houston's techniques as violative of the Voting Rights Act.

II. THE COURTS BELOW LACKED JURISDICTION TO CONSIDER THE CITY'S COUNTERCLAIM

Not only did the City of Houston circumvent the Voting Rights Act through its counterclaim, but its suit lacked the essential elements needed to meet the case or controversy requirement of Article III of the Constitution.[9]

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[9] It should also be noted that the city used the counterclaim to avoid the Voting Rights Act's mandate that section 5 issues be considered by a three-judge court. Section 5 states: "Any action under this section shall be heard and determined by a court of three judges...." 42 U.S.C. § 1973c. If the appellants or the Attorney General had brought suit against the city for attempting to implement a redistricting plan in violation of section 5, a three-judge panel would have been required. *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 645 (1977) (per curiam). Similarly, had the city brought a declaratory judgment action

The petitioners did not implement plan #1, which the city sought to be declared unconstitutional. It was the city itself that had control over the old plan. Nor did the petitioners have any power over which redistricting plan should be used. The city first enacted the possibly malapportioned plan, and the city then attempted to implement an objected-to redistricting plan. No actual controversy between adverse parties existed since the only actor was the city. Therefore, the district court lacked jurisdiction. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 361 (1911).

In declining to stay the district court's order based on the potential injury at stake, Justice Scalia nonetheless declared that he was "doubtful of the district court's authority to issue the present order." *Campos v. City of Houston*, 112 S.Ct. 354 (1991) (Scalia, J., in chambers). Because the city must not be allowed to skirt a constitutional requirement, this Court must make clear the district court's authority.

Since the petitioners had no power over redistricting, and since the city's counterclaim was not in response to the petitioners' original suit, the city lacked standing. In *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976), this Court held that Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant...." The only party meeting that description in *Campos* is the city

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against the United States, under section 5, a three-judge District of Columbia panel would have heard the case. 42 U.S.C. § 1973c. Here, however, the city used an already pending suit to circumvent the three-judge requirement.

itself. Therefore, in *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966), this Court describes a covered jurisdiction's "controversy" with the United States not with minority citizens.

Further, the city had no reason to believe it was preempting litigation. The petitioners never threatened to bring a one-person, one-vote claim to halt the election, which would have opened the way for a declaratory judgment. The petitioners expressed no interest in the malapportioned single-member council seats. In fact, the section 2 suit concerned only the at-large seats and their dilution of Hispanic voting strength. The petitioners had no desire to enjoin only the single-member seats under a one-person, one-vote challenge that would leave the at-large seats intact.

If the petitioners had not brought their section 2 claim, they could not have been sued. The city would have had no plausible reason to sue its Hispanic community for a one-person, one-vote declaratory judgment and the installation of an interim plan. The petitioners had no power over the redistricting process. That the petitioners were already in court on an unrelated matter should not serve as reason to allow otherwise untenable claims.

The use of the Declaratory Judgment Act in no way reduces the application of the case or controversy requirement.[10] This Court has made clear that "the

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[10] The Declaratory Judgment Act provides that if there exists "a case of actual controversy within its jurisdiction, ... any court of the United States ... may declare the rights and other legal relations of any interested party...." 28 U.S.C. § 2201(a) (1988).

operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). To meet the Article III requirement, a substantive controversy must still exist that is "definite and concrete, touching the legal relations of parties having adverse legal interests." *Haworth* at 240-41.

Allowing covered jurisdictions to bring suits that do not meet the case or controversy requirement has negative policy ramifications. The city's counterclaim against the Hispanic citizens served only as retaliation for bringing the section 2 claim in the first place. This Court should not tolerate such a punitive response.

The petitioners did not even file a section 5 or a one-person, one-vote claim. Thus, the city was not answering the petitioners' allegations, but in effect sued itself and all of its citizens by bringing an unrelated counterclaim against some of its citizens -- citizens who were not responsible for any of the plans in question. If covered jurisdictions are allowed to bring such suits, a chilling effect will result. The resources of minority groups will be drained defending section 5 actions, leaving such advocacy groups in a poor position to perform their primary purpose of protecting minority rights. The appeals court's reasoning would even allow covered jurisdictions to bring suits against minority groups that are not litigating, but are simply protesting against an apportionment plan.[11]

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[11] This is precisely what happened in *Scottsboro v. Battles*, No. 88-5318 (N.D. Ala. Sep. 8, 1988) (settled after appeal filed). After complaints by two African-American organizations about the legality of

Furthermore, if the city can essentially sue itself for a declaratory judgment and injunctive relief in this situation, the limits on creative pleading are virtually boundless.[12] Covered jurisdictions will always prefer to sue parties like the petitioners rather than face the Attorney General's resources and prestige. Replacing the congressionally chosen defendant of the federal government with a private defendant violates the case or controversy requirement of Article III, twists the Voting Rights Act beyond recognition, and potentially threatens the right to vote.

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the Scottsboro City Council election system, the city sued the minority groups seeking a declaratory judgment that the election system was valid under section 2 of the Voting Rights Act. In addition to questions like those raised in *Campos* regarding whether this was an appropriate use of the Declaratory Judgment Act and whether a case or controversy was present, the *Battles* case raises troubling free speech issues. Even if a line theoretically can be drawn that only allows reverse declaratory judgment suits when minority groups are already involved in litigation, this Court has held that litigation is protected activity under the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-30 (1963). The potential for retaliation through bringing a lawsuit against minority groups can only have a chilling effect on protected activity. Further, allowing covered jurisdictions to bring preemptive suits will complicate an already difficult process and multiply the amount of voting rights litigation.

[12] The most recent round of redistricting for the Illinois legislature was decided when one faction of the Illinois Legislative Redistricting Commission brought a declaratory judgment action against the rest of the Commission's members. *Illinois Legislative Redistricting Comm. v. LaPaille*, 786 F. Supp. 704 (N.D. Ill. 1992) (three-judge court), *petition for cert. filed*, 61 U.S.L.W. ____ (U.S. Sep. 8, 1992) (No. 92-522).

III. The Courts Below Lacked Authority to Implement a Plan to Which the Attorney General Objected

Even if the city complied with both section 5 and jurisdictional requirements in suing its own minority citizens, an interim plan cannot be used to circumvent the preclearance requirements of the Voting Rights Act. If Houston were allowed to implement a plan to which the Attorney General objected simply by labeling it an "interim" plan, section 5 would be eviscerated. Covered jurisdictions would have every incentive to wait until just before an election in order to put into place a redistricting plan. As this Court has recognized, however, Congress made a purposeful decision "to shift the advantage of time and inertia from the perpetrators of the evil [voting discrimination] to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The Voting Rights Act was meant to put an end to the advantages of delay and to the types of tactics used by the city. Although the appeals court ruled that the district court abused its discretion in implementing the objected-to plan, this Court should make clear that the decision was error as a matter of law.

One of the main purposes of the Voting Rights Act was to set up a system that would avoid the problems of litigation where jurisdictions use "new discriminatory techniques not covered by the letter of the judgment." *Voting Rights: Hearings Before Senate Judiciary Comm.*, 89th Cong., 1st Sess., part 1 at 14 (1965) (testimony of Attorney General Katzenbach); *see also* H. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965) (need for "more effective

measures"). In extending the Voting Rights Act in 1982, Congress declared that "[w]ithout the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices." S. Rep. No. 417, 97th Cong., 2d Sess. 10 (1982). The Voting Rights Act was meant to erect an airtight preclearance requirement.

This is not the first time that this Court has been called upon to stop lower courts from circumventing preclearance requirements. *McDaniel v. Sanchez*, 452 U.S. 130 (1981), for example, held that a district court ruled incorrectly in not requiring a reapportionment plan fashioned by a covered jurisdiction in compliance with a court order to be precleared under section 5. This Court declared that "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, the statute might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries." *Id.* at 151. Houston simply found another way to make delay work in its favor.

It is uncontested that given an emergency, a court-ordered plan is appropriate. Unlike the district court, however, courts in the past have followed a more logical line of reasoning in evaluating redistricting plans to which the Attorney General has objected. In *Clark v. Roemer*, 111 S.Ct. 2096 (1991), this Court held that the district court erred in not enjoining judicial elections to which the Attorney General objected. Several cases demonstrate that the prevailing judicial opinion would not sanction the district court's embrace of an objected-to plan when a precleared plan was available.

In an injunction action to prevent South Carolina from avoiding preclearance procedures by adopting an interim plan through litigation, a three-judge District of Columbia panel reasoned that when courts are asked to develop interim plans "the 'interim' plans they adopt should not put into effect the very plans being substituted which have failed of preclearance by the Attorney General or are awaiting a preclearance decision by this Court." *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge court) (per curiam). The court was wary of collusive litigation resulting in circumvention of section 5 through the vehicle of an interim plan. *Id.* Although the *Campos* litigation was not collusive, it had the same circumventive effect.

In *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court) (per curiam), *vacated and remanded on other grounds*, 461 U.S. 921 (1983). the district court noted that "it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5." *Id.* at 1141. The implication is that if a precleared plan does exist, it should be used as the interim plan. The court's reasoning further supports this implication. "Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General." *Id.* at 1142.

Similarly, in *Terrazas v. Clements*, 537 F. Supp. 514, 540 (N.D. Tex.) (three-judge court) (per curiam), *stay denied*, 456 U.S. 902 (1982), the court, in deciding which potential plan to implement after the Attorney General objected to the redistricting plans for the Texas legislature,

took notice that no potential plan had been precleared. Therefore, the choice was between various unprecleared plans. The court's reasoning suggests that had one of the plans been precleared, it would have been chosen.

Lower courts have also enjoined elections from being held under unprecleared plans when the Attorney General has not made a final determination, *e.g.*, *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981) (three-judge court) (per curiam), or when a preclearance action is pending in the District Court for the District of Columbia. *E.g.*, *Heggins v. City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979) (three-judge court).

Additionally, courts have consistently reasoned that an unprecleared plan, if it must be implemented on an interim basis, should be modified to respond to the Attorney General's concerns. *E.g.*, *Terrazas v. Clements*, 537 F. Supp. 514, 539, 547 (N.D. Tex.) (three-judge court) (per curiam), *stay denied*, 456 U.S. 902 (1982); *Burton v. Hobbie*, 543 F. Supp. 235, 239 (M.D. Ala.) (three-judge court), *aff'd*, 459 U.S. 961 (1982). The *Campos* court, however, engaged in no such modification.

If the district court felt that it did not have time to order plan #3 into effect, it could have ordered the election to take place under the malapportioned plan #1 under its emergency power exercised in one-person, one-vote cases. *See, e.g.*, *Ely v. Klahr*, 403 U.S. 108 (1971) (malapportioned state legislative redistricting plan used temporarily); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam) (district court upheld in allowing election under unconstitutional plan).

A good illustration of such reasoning in the context of the Voting Rights Act is *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss.) (three-judge court) (per curiam), *aff'd in part and vacated in part*, 112 S.Ct. 412 (1991). The district court in *Watkins* ordered elections held under a preexisting unconstitutional plan as an interim measure rather than under a plan fashioned by the court after the Attorney General objected to the legislatively passed plan.

In keeping with both legislative intent and precedent, courts need to remain firm on the use of interim plans. The practical necessity for this rigidity can be seen in that by the time the Fifth Circuit overturned the district court for abusing its discretion in implementing the unprecleared plan, the election was over and the damage done. Since it is difficult to get a new election ordered, invalid schemes will remain in place for that election. In *Campos*, for instance, a three-judge panel recently declined to order a new election. *United States v. City of Houston*, Nos. 91-3076, 91-3117, 1992 WL 232359 (S.D. Tex. August 21, 1992) (three-judge court). District courts must make an initial correct decision on interim plans or the Voting Rights Act will be effectively circumvented.

Campos has already been cited as authority for allowing an election to proceed under a plan to which the Attorney General has interposed an objection. *Lopez v. Hale County*, 1992 U.S. Dist. Lexis 13217, at *16 n.7 (N.D. Tex. Sep. 1, 1992) (three-judge panel), *stay denied*, 61 U.S.L.W. 3253 (U.S. Sep. 30, 1992). This Court must act to preserve the Voting Rights Act by preventing any further application of the *Campos* decision.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-6100.

JESSE CAMPOS, W.R. (RESENDEZ) MORRIS, AND MEXICAN AMERICAN BAR ASSOCIATION OF HOUSTON, PLAINTIFFS-APPELLANTS,

v.

CITY OF HOUSTON, *ET AL.*, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Southern District of Texas

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July 31, 1992

Frumencio Reyes, Jr., Reyes & Reyes-Castillo, P.C., Frank Alvarez, Jr., Houston, Tex., Judith A. Sanders-Castro, San Antonio, Tex., for plaintiffs-appellants.

Miriam R. Eisenstein, David K. Flynn, Attys., Dept. of Justice, Washington, D.C., for amicus-U.S.

C. Robert Heath, Steve Bickerstaff, Sydney W. Falk, Jr., Myra A. McDaniel, Bickerstaff, Heath & Smiley, Austin, Tex., for City of Houston.

Michael J. Zomcik, Bonham, Carrington & Fox, Houston, Tex., for amicus-Clymer Wright.

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:

On our own motion, we withdraw our prior opinion reported at 960 F.2d 26, and substitute the following:

The district court required that the November 1991 Houston City Council election be conducted under a reapportionment plan objected to by the Attorney General of the United States. Because we find that the district court abused its discretion, we VACATE the judgment of the district court and REMAND the case for such further proceedings, if any, that may be necessary.

I

In 1979, the City of Houston adopted a form of government consisting of a fifteen-member council, including the mayor, who is also a member of the council ("Plan 9-5-1 # 1). All are elected for concurrent two-year terms. Nine of the council members are elected from single-member districts; six, including the mayor, are chosen at large.

In April 1991, the Hispanic citizens filed suit against the City, alleging that the at-large elections for council members dilute Hispanic voting strength in violation of Section 2 et seq. of the Voting Rights Act of 1965 (as amended), 42 U.S.C. § 1973 et seq., and the Fourteenth Amendment to the United States Constitution. The Hispanic citizens asked the district court to enjoin all future elections under the at-large scheme and to order into effect a 22-member City Council. The City of Houston moved for summary judgment; that motion is pending before the district court.

Meanwhile, 1990 census data had revealed that the nine single-member districts in Plan 9-5-1 # 1 were significantly unequal in population, in violation of the one-person, one-vote requirements of the Fourteenth Amendment. Accordingly, on June 5, 1991, the City of Houston adopted a redistricting plan for the nine single-member districts, using 1990 census data ("Plan 9-5-1 # 2"). On that same day, the City also adopted an alternative redistricting plan consisting of sixteen single-member districts, which was to be implemented if an August 10 charter revision election on the issue was successful. On July 9, the City submitted both alternative plans to the Attorney General of the United States, as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. In the August 10 City Charter revision election, the sixteen single-member district alternative reapportionment plan was rejected by the voters; therefore, the Attorney General did not consider that alternative.

On August 21, the Attorney General requested more

information regarding Plan 9-5-1 # 2. The Attorney General requested that the City respond to specific allegations that the Department of Justice had received from the Hispanic community in Houston that the plan discriminated against them. The City made several responses to the Attorney General's request, but did not complete its submission until September 27. The City proceeded with steps to implement the unprecleared Plan 9-5-1 # 2 in preparation for the scheduled November 5 election.

On October 4, the Attorney General interposed a timely objection to the proposed Plan 9-5-1 # 2 pursuant to Section 5 of the Voting Rights Act. On October 7, the City filed a motion for leave to file a supplemental counterclaim against the Hispanic citizens in the Section 2 action. In the counterclaim, the City asked for a declaration regarding the constitutionality of the malapportioned Plan 9-5-1 # 1, and requested that the district court order that Plan 9-5-1 # 2 (the plan to which the Attorney General had objected) be used as an interim plan for the November 5 City Council elections. The United States Attorney General moved to participate as an *amicus* and filed a detailed brief objecting to the jurisdiction of the court. At a hearing on October 9, the City presented testimony from election officials that it would be physically impossible to hold the November 5 election under any plan other than Plan 9-5-1 # 2, the one objected to by the Attorney General. At the conclusion of that hearing, the court directed the parties to meet and attempt to settle the issues. The hearing was continued until October 11.

A few hours before the October 11 hearing, the Houston City Council adopted an entirely different plan of apportionment of the nine single-member council districts ("Plan 9-5-1 # 3"), and immediately submitted it to the Department of Justice via telefax for preclearance. At the hearing that afternoon, counsel for the City announced to the district court that the City had been unable to reach an agreement with the Hispanic citizens. However, the City urged the court to adopt Plan 9-5-1 # 3 as an interim plan pending preclearance.

At the conclusion of the hearing, the court stated that it had three plans before it: (1) the malapportioned Plan 9-5-1 # 1, under which members of the Houston City Council were elected during the 1980s; (2) Plan 9-5-1 # 2, to which the Department of Justice had objected; and (3) Plan 9-5-1 # 3, which had been passed by the City Council only hours before the hearing. The City urged that the court not order it to use Plan 9-5-1 # 1, because it was based on the 1980 census and presumably had large population deviations among the districts. The Hispanic citizens opposed Plan 9-5-1 # 2, because it had been objected to by the Department of Justice. They did not support the new Plan 9-5-1 # 3, although they acknowledged that it was an improvement over Plan 9-5-1 # 2.

On October 12, before the district court issued its ruling, the Attorney General precleared Plan 9-5-1 # 3, subject to reconsideration in the event that new information came to his attention before the expiration of the sixty-day period within which he is allowed to object to plans

submitted by covered jurisdictions. A copy of the preclearance letter was sent by telefax to the district court. Later that afternoon, however, the district court ordered that the November 5 elections be conducted under unprecleared Plan 9-5-1 # 2. The court reasoned that, although Plan 9-5-1 # 3 had been precleared, it should not be used, because the Hispanic citizens objected to it, and the Attorney General might change his mind.

On October 16, the Hispanic citizens moved for a stay, which the district court denied the following day. On October 18, the Hispanic citizens sought a stay from this court, which was denied on October 24. The Hispanic citizens' request for relief from the United States Supreme Court was also denied.

On October 17, the United States filed a separate enforcement action against the City of Houston seeking to enjoin the November 5 election because it was proceeding under an unprecleared plan of apportionment. *United States v. City of Houston*, No. H-91-3076 (S.D.Tex.). In the alternative, the United States requested that special elections, under a precleared plan, be scheduled as soon as practicable. A three-judge panel was convened, and a hearing was set for October 28. On October 29, the three-judge panel refused to grant the injunction, noting:

> The Fifth Circuit's denial of a stay operated on the understanding that Judge Hittner's order represents a temporary expedient.... The City cannot plausibly contend on the one hand that Judge Hittner's order

> represents an *interim* plan and then on the other hand, aver that the office holders elected in next Tuesday's election will continue in office for the entire terms. As far as this court is concerned, the interim order of Judge Hittner, if affirmed by the Fifth Circuit, will require an election under a constitutional, precleared or court imposed districting scheme in far less than two years.

The Hispanic citizens timely appealed, and the United States filed an *amicus* brief supporting the Hispanic citizens' position.

II

The Hispanic citizens and the United States argue that the district court lacked jurisdiction or otherwise exceeded its authority in granting relief on the City's counterclaim because (1) the counterclaim did not present a justiciable "case or controversy"; and (2) the counterclaim is an action under Section 5 of the Voting Rights Act and, therefore, only a three-judge court authorized to decide Section 5 issues could have ordered the relief sought by the City. We conclude that the district court had the power to grant some form of interim relief, but that it abused its discretion in ordering the election to be conducted under unprecleared Plan 9-5-1 # 2, to which the Attorney General had interposed a timely objection.

A

The Hispanic citizens and the United States contend that the City's counterclaim did not present a justiciable case or controversy because the Hispanic citizens' Section 2 action related solely to the at-large seats, and they had not filed a malapportionment challenge to Plan 9-5-1 # 1. We disagree. Although the procedural context in which the counterclaim was filed is rather unusual, we conclude that the requirements of Article III were satisfied. Under state law, the City was required to conduct the election as scheduled; but the only precleared apportionment plan available after the Attorney General objected to Plan 9-5-1 # 2 was the malapportioned Plan 9-5-1 # 1 used during the 1980s. Had the City chosen to use Plan 9-5-1 # 1, it faced the very substantial likelihood of an injunctive challenge and postponement of the election, or later vacation of the election results. It therefore chose to file the counterclaim against the Hispanic citizens in the Section 2 action and obtain a declaration that Plan 9-5-1 # 1 was unconstitutionally malapportioned, thus clearing the way for a court-ordered plan for use in the impending election. Under the circumstances, we cannot say that the course chosen by the City necessarily was either improper or taken in bad faith, nor did the City's lawsuit prevent the Attorney General from proceeding to consider preclearance matters.

B

1

Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, covered jurisdictions, such as the City of Houston, may implement changes in voting procedures in only two ways: (1) by obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change does not have the purpose or effect of abridging the right to vote on account of race; or (2) by submitting the proposed change to the Attorney General for preclearance. Challenges to an objection by the Attorney General may be heard only by the District Court for the District of Columbia. *E.g.*, *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). However, Section 5's "preclearance requirements [do] not apply to plans prepared and adopted by a federal court to remedy a constitutional violation." *McDaniel v. Sanchez*, 452 U.S. 130, 138, 101 S.Ct. 2224, 2230, 68 L.Ed.2d 724 (1981).

Section 5 states, in pertinent part, that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28...." 28 U.S.C. § 2284(a) provides:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or

> the apportionment of any statewide legislative body.

Because this is not an action challenging either a congressional apportionment scheme or a state-wide apportionment scheme, it falls within § 2284(a), thus requiring a three-judge court, only if the action is one "under" Section 5. Furthermore, we should note that a three-judge court convened under Section 5 is a court of limited jurisdiction and limited authority. In *United States v. Board of Supervisors*, 429 U.S. 642, 645, 97 S.Ct. 833, 834, 51 L.Ed.2d 106 (1977), the Supreme Court held that "[a]ttempts to enforce changes that have not been subjected to [section 5] scrutiny may be enjoined by any three-judge district court in a suit brought by a voter ... or by the Attorney General on behalf of the United States." "Enforcement" only includes the determinations whether a voting change is covered by Section 5, whether the preclearance requirements have been met and, if they have not, what remedy is appropriate. *Id.*

2

The City contends that its counterclaim is not an "action under" Section 5 because it did not challenge the merits of the Attorney General's objection to Plan 9-5-1 # 2, and did not seek to have the district court order Plan 9-5-1 # 2 to be used as the *permanent* plan for the 1990s. Each underlying point is correct. Because the City asked that the unprecleared Plan 9-5-1 # 2 be used as an *interim* plan for the November 5 election, the City did not seek relief that necessarily would circumvent preclearance

requirements. Instead, the City sought to alleviate the difficult situation it faced after the electorate had rejected the sixteen single-member district plan and the Attorney General had objected to Plan 9-5-1 # 2. Thus, we believe the question is not whether the district court's jurisdiction and the Attorney General's Section 5 responsibility are in conflict; rather, the question is under what conditions did the court have the authority to order an interim election, notwithstanding an unresolved Section 2 case and the absence of a precleared redistricting plan.

As the Attorney General acknowledges, the district court had the authority to order some form of emergency relief. *See* Brief for the United States as Amicus Curiae, pp. 18-19 (district court had power to enjoin election pending preclearance of a new plan; to devise its own plan, correcting the objections raised by the Attorney General to the prior submission; or to adopt precleared Plan 9-5-1 # 3); *see also Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982). To hold, as the plaintiffs urge, that the district court "lacked jurisdiction" to adopt--as only an interim measure--the plan to which the Attorney General had initially objected creates unacceptable tensions with the consistently-recognized discretion of the district court to formulate and authorize the implementation of interim election plans in voting rights cases. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981); *Connor v. Finch*, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977). Such a holding is further objectionable because, illogically, it would make *jurisdiction* depend upon the relief ultimately ordered by the court. Courts cannot

operate under such *post hoc* rules.

Second, although whether and why the Attorney General has objected to a certain plan are very relevant factors for the Section 2 court to consider, alone they cannot preclude the court from using that plan as an interim measure. The Attorney General's objection or lack thereof does not necessarily indicate that the plan is constitutional or unconstitutional: it simply means that the plan has not met the necessary procedural requirements. Under appropriate circumstances, even an unconstitutional plan may be implemented on an interim basis. *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982). Moreover, as far as Section 5 is concerned, there is no distinction between a plan to which the Attorney General has objected and a plan that has not been submitted to the Attorney General at all: in either case Section 5 has not been satisfied. Thus, in deciding whether the court has authority to act, a determination cannot be rationalized on the basis of the Attorney General's filing or failure to file an objection. The plaintiffs' jurisdictional argument thus stands in conflict with the scope of authority that Section 2 courts have traditionally possessed.

Third, in view of the decidedly limited jurisdiction of three-judge courts, it is unclear why a three-judge court can decide, as the plaintiffs suggest, what kind of interim relief is necessary during the pendency of a Section 2 action. A three-judge court is required only to decide whether Section 5 applies, and if so, whether it has been satisfied. Section 2 does not require three-judge courts

when statewide apportionment schemes are not at issue, yet the plaintiffs' position would require their intervention in Section 2 cases on a wide scale.

Finally, the problems in a "jurisdictional" analysis of a Section 2 court's interim election order become apparent when one considers the daunting variety of procedural issues that might arise from interrelating single-judge and three-judge court functions. All of these reasons persuade us of the lack of merit of a jurisdictional objection to the City's counterclaim.

3

Notwithstanding that the district court had jurisdiction to grant interim relief, however, we conclude that on the facts of this case that it abused its discretion. After the Attorney General objected to Plan 9-5-1 # 2, there were several alternatives available to the district court: (1) it could have enjoined the use of Plan 9-5-1 # 1 and enjoined the election pending preclearance of a new plan; (2) it could have devised its own plan, perhaps responding to the objections raised by the Attorney General to Plan 9-5-1 # 2; or (3) it could have ordered that the election be conducted under Plan 9-5-1 # 3, which the Attorney General conditionally precleared at the last minute, and which the City supported. The district court offered weak reasons for *refusing* to order an election under the belatedly precleared Plan 9-5-1 # 3 and thus for ignoring the Justice Department's role in the redistricting process. Contrary to the district court's proffered rationale, the Hispanic citizens' objection to Plan 9-5-1 # 3 cannot

have been significant, because they also objected to Plan 9-5-1 # 2, which the court adopted. That some changes in local voting procedures were necessary is likewise no reason to refuse Plan 9-5-1 # 3, because the City agreed to that plan and urged its adoption notwithstanding such difficulties. In short, the district court's preference for Plan 9-5-1 # 2, instead of Plan 9-5-1 # 3, apparently was guided more by *its* preference than by the significant factors of Justice Department conditional preclearance and City support for Plan 9-5-1 # 3. We cannot approve the district court's unsupported choice, given the available alternatives.

C

Our holding is narrow and fact-bound. We reiterate that a court-ordered reapportionment plan is not subject to the preclearance requirements of Section 5. *See McDaniel v. Sanchez*, 452 U.S. at 138, 101 S.Ct. at 2230. Further, elections may be held under exigent circumstances under a plan to which the Attorney General has objected. *See Clark v. Roemer*, --- U.S. ----, ----, 111 S.Ct. 2096, 2102, 114 L.Ed.2d 691 (1991). When, however, the district court does not fashion its own plan as an interim measure, and it *rejects*, without adequate reasons, a precleared plan in favor of a legislative plan that has not been precleared, it abuses its discretion in awarding interim relief.

III

The district court abused its discretion in awarding interim relief and, thus, we VACATE the October 12th

order. The parties have not requested that we set aside the November 5 election results. This opinion should not be construed as having any such an effect, nor should it be construed as requiring the district court to order new elections under a different plan. We REMAND the case for further proceedings as the district court deems necessary, which should not be inconsistent with this opinion.

VACATED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-91-885.

JESSE CAMPOS, W.R. (RESENDEZ) MORRIS,
AND MEXICAN AMERICAN BAR ASSOCIATION
OF HOUSTON, PLAINTIFFS,

V.

CITY OF HOUSTON, *ET AL.*,
DEFENDANTS.

ORDER, Oct 12, 1991

Frumencio Reyes, Jr., Reyes & Reyes-Castillo P.C., Houston, Tex., for plaintiffs.

Myra A. McDaniel, Bickerstaff, Heath & Smiley, Austin, Tex., for defendants.

John D. Lenoir, Asst. U.S. Atty., Houston, Tex., for John R. Dunne, Asst. Atty. Gen., Civ. Rights Div., Dept. of Justice.

Wayne Fox, Michael J. Zomcik, Bonham, Carrington & Fox, P.C., Houston, Tex., for Clymer Wright and Citizens for Term Limitation.

Barry Barnes, Barnes & Turner, Houston, Tex., for Mayoral Candidate Sylvester Turner.

HITTNER, District Judge:

Pending before this Court is a supplemental counterclaim (attached to Document # 24) and first amended supplemental counterclaim (filed October 10, 1991) filed by the defendant City of Houston ("the City"). The parties appeared before the Court on October 9, 1991, at 10:00 a.m. for a scheduled hearing on the counterclaim. Additionally, the Court granted leave for two nonparties to participate in the hearing: Clymer Wright, who filed a motion to intervene on behalf of himself and other voters supporting Citizens for Term Limitation, and the United States Department of Justice. The parties subsequently appeared before the Court on October 11, 1991, at 1:30 p.m. for a continuation of the aforementioned hearing. At that time, the Court additionally granted leave for nonparty and mayoral candidate Sylvester Turner to participate in the hearing. The Court has considered the counterclaim, the submissions of the parties, the argument of counsel, the testimony in open court, and the applicable law.

STATEMENT OF FACTS

In 1979 the City of Houston adopted the current system of nine councilmembers elected from

single-member districts, five councilmembers elected at-large, and the mayor elected at-large ("9-5-1 plan # 1"). After the 1990 federal census data was published, the City Council of the City of Houston formally determined through Ordinance 91-282 enacted on February 27, 1991, that the population of the existing council districts was "materially imbalanced." See Defendant's Exhibit 5. In April 1991, the plaintiffs, Mexican-American and Hispanic residents of Houston and the Mexican American Bar Association of Houston, originally filed this cause of action challenging the "at-large" portion of the City's scheme for electing members of the City Council. Plaintiffs brought the instant lawsuit pursuant to 42 U.S.C. §§ 1971, 1973, 1983, 1988 and the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs sought a permanent injunction prohibiting the City from holding any future elections for City Council under the 9-5-1 plan # 1. See Document # 3.

On June 5, 1991, the City Council adopted Ordinance 91-794, re-drawing the nine single-member districts to be of approximately equal population size. The Council alternatively proposed to change the City Council's structure to a council of 16 members elected from single-member districts, 6 members elected at-large, and a mayor elected at-large ("the 16-6-1 plan"). The City submitted both the new, proposed 9-5-1 plan ("9-5-1 plan # 2") and the 16-6-1 plan to the United States Attorney General for preclearance pursuant to the Voting Rights Act § 5. 42 U.S.C. § 1973c (1965). The Attorney General's review of the 16-6-1 plan, however, was contingent upon voter approval of this plan pursuant to Texas state law.

On August 10, 1991, the voters of the City of Houston rejected the 16-6-1 plan. Thus, the Attorney General reviewed only 9-5-1 plan # 2. On August 21, 1991, the Attorney General made a written request for additional information regarding 9-5-1 plan # 2. The City began responding to the request on August 29, 1991, and the submission was complete by September 27, 1991.

Late in the afternoon on Friday, October 4, 1991, Assistant Attorney General John R. Dunne transmitted a letter to the City denying preclearance and interposing an objection to 9-5-1 plan # 2 under the Voting Rights Act § 5. Dunne concluded that the City had failed to sustain its burden under § 5 that the "submitted change has neither a discriminatory purpose nor a discriminatory effect." See Defendants' Exhibit # 8. The City's recourse under § 5 was threefold: (1) ask the Attorney General to reconsider the objection, (2) seek a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia, or (3) abandon the plan. 42 U.S.C. § 1973c (1965). The City informed the Court that it has abandoned 9-5-1 plan # 2 as a *permanent* redistricting plan.

Currently, no viable plan exists to govern the November 5, 1991 elections for the Houston City Council. The City determined last February, and conceded in open court, that the districts under 9-5-1 plan # 1 are malapportioned. The City cannot itself implement 9-5-1 plan # 2 because of the Attorney General's objections. Two other plans proposed are not currently available for interim use in the November 5 election. To enable the

November 5 election to proceed as scheduled, the City filed the instant supplemental counterclaim requesting this Court to designate the districts drawn in 9-5-1 plan # 2 as an interim plan for this election only. Additionally, at the October 11, 1991 hearing, both parties asked this Court to determine whether a referendum regarding a 16 single-member district plan ("the 16-1 plan") should be included on the November 5, 1991 ballot in the event that the Court enters an interim plan.

POWER OF THE COURT TO ENTER AN INTERIM PLAN

Reapportionment is primarily a legislative responsibility. Federal judicial relief becomes appropriate, however, when the legislative body "fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Upham v. Seamon*, 456 U.S. 37, 41, 102 S.Ct. 1518, 1521, 71 L.Ed.2d 725 (1982) (quoting *White v. Weiser*, 412 U.S. 783, 794-795, 93 S.Ct. 2348, 2354-2355, 37 L.Ed.2d 335 (1973)). In Houston, the City Council bears the first responsibility for redistricting under the existing 9-5-1 council structure mandated by the city charter. The Council's efforts to redraw the single-member districts, reflected in Ordinance 91-794, failed under § 5 scrutiny. The legislative body, the City Council, has therefore failed to reapportion in accordance with the Voting Rights Act § 5 and the United States Constitution. Under such circumstances, this Court functions as a court of equity charged with fashioning interim relief. *Watkins v. Mabus*, 771 F.Supp. 789, 798 (S.D.Miss.1991) (Barksdale, Circuit

Judge, and Lee and Pickering, District Judges), *stay pending appeal denied*, (U.S.Sup.Ct. Aug. 20, 1991) (holding that "[t]he application for injunction and stay pending appeal presented to Justice Scalia and by him referred to the Court is denied," although Justices Marshall and Blackmun noted that they would grant the application). *See also Terrazas v. Clements*, 537 F.Supp. 514 (N.D.Tex.1982) (3-judge court) (Court ordered the 1982 election for the Texas legislature to proceed according to modified unprecleared plan).[1] The three-judge panel in *Watkins* recently faced a dilemma much like that which this Court faces now. The State was without a constitutional plan for the 1991 election of the Mississippi Legislature. *Id.* at 806. The Mississippi general elections scheduled for November 5, 1991 were imminent and did not permit an opportunity for preclearance of a constitutional plan. *Id.* at 802, 806. In their *per curiam* opinion, the panel determined that it was essential for the Court to exercise its equitable powers to implement an interim plan. *Id.* at 806. This Court, too, determines that in the absence of a constitutional plan and in the face of imminent elections, equity demands an interim plan.

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[1] A three-judge panel is required "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (1960). Because the instant case involves a citywide election, a three-judge panel need not be convened.

THE OPTIONS BEFORE THE COURT

In fashioning interim relief, this Court should consider the proximity of the impending election and the mechanics of the election laws, and should rely upon general equitable principles. *Reynolds v. Sims*, 377 U.S. 533, 585-587, 84 S.Ct. 1362, 1393-1395, 12 L.Ed.2d 506 (1964); *Terrazas*, 537 F.Supp. at 538. If time does not permit a court to itself create a plan that meets the standards of the Voting Rights Act § 2, that court should consider the options already available. *Watkins* at 800. The Supreme Court has at times authorized district courts to permit elections to proceed under interim districting plans "that do not in all respects measure up to the legal requirements, even constitutional requirements." *Upham*, 456 U.S. at 44, 102 S.Ct. at 1522; *Watkins* at 802; *Terrazas*, 537 F.Supp. at 538.

Time does not permit this Court to either design its own plan or receive extensive proof on the issue of the best interim plan. The election is imminent, absentee balloting is scheduled to begin in four days, and the county and city's election machinery is in progress. As in *Watkins*, this Court is faced with "an exceptionally expedited schedule and a shortage, if not lack, of acceptable options." *Id.* at 804. The Court's options for an interim plan, none of which is ideal, include: 9-5-1 plan # 1, other recently-proposed plans, and 9-5-1 plan # 2.

First Option: 9-5-1 Plan # 1

As a general rule, 9-5-1 plan # 1 would remain in effect until a new plan is precleared by the Attorney General. *City of Rome v. United States*, 446 U.S. 156, 182, 100 S.Ct. 1548, 1564, 64 L.Ed.2d 119 (1980). The plaintiffs asked this Court to enjoin the use of 9-5-1 plan # 1 when they filed this lawsuit. The City conceded in open court that 9-5-1 plan # 1's single-member districts now violate the one-person, one-vote principle. The Court thus determines, based upon the City's representations, that injunctive relief is appropriate concerning 9-5-1 plan # 1.

Second Option: Other Proposed Plans

Two other plans were proposed to the Court for use as an interim plan. First, the plaintiffs suggested a plan with 16 single-member districts. The 16-1 option is a variation of the 16-6-1 plan that the voters refused to approve in the citywide referendum. Second, last-minute City Council sessions resulted in yet another 9-5-1 plan ("9-5-1 plan # 3") passed yesterday, October 11, 1991. According to testimony, 9-5-1 plan # 3 would have the effect of pairing two incumbents and potentially jeopardizing a current African-American district. The plaintiffs informed the Court that they oppose 9-5-1 plan # 3, as well as any plan other than 16-1. The plaintiffs indicated in open court an intent to formally present their opposition to 9-5-1 plan # 3 to the Department of Justice, but they have not yet had the opportunity.

The City forwarded 9-5-1 plan # 3 to the Attorney

General for expedited § 5 preclearance prior to the hearing on October 11, 1991, with no advance notice to this Court. This morning, less than two hours before this order was scheduled to issue, the Department of Justice notified the Court by facsimile transmission that 9-5-1 plan # 3 had received tentative approval. Specifically, the Assistant Attorney General's letter reads, in part, as follows:

> The Attorney General does not interpose any objection to the specified change [9-5-1 plan # 3]. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period.

The sixty-day statutory review period does not expire until approximately December 10, 1991, a date which is later than both the scheduled general election and the anticipated run-off election.

This Court does not dispute that either 16-1 or 9-5-1 plan # 3 may be a viable plan. Yet, given the circumstances, the Court cannot adequately review those plans unless the Court reopens filing deadlines and/or postpones absentee (mail) and early balloting.

Third Option: 9-5-1 Plan # 2

Candidate filing for the positions of mayor, comptroller, and members of the council, which closed on September 23, 1991, was conducted under the unprecleared 9-5-1 plan # 2. Early absentee ballots were scheduled to have been mailed on October 7, 1991, but were held after the Attorney General denied preclearance. Early (absentee) balloting is scheduled to begin October 16, 1991.

Only 9-5-1 plan # 2 will enable the elections to proceed as scheduled. The 9-5-1 plan # 2 *is not a retrogression;* that is, it does not place Hispanic voters in a worse position than 9-5-1 plan # 1. Ideally, the Court could modify the plan, on an interim basis, in an attempt to address the Attorney General's objection, but the general nature of the objection and time constraints realistically preclude this modification.

THE INTERIM PLAN

Despite the Attorney General's preclearance of 9-5-1 plan # 3 less than two hours ago, this Court implements the 9-5-1 plan # 2 on an interim basis to insure that the 1991 election will proceed on schedule. Testimony of the County Clerk of Harris County established that, were 9-5-1 plan # 3 to be used, a separate, delayed city election would be inevitable, and lower voter turnout would result. The goals to maximize voter turnout and to minimize voter confusion and taxpayer cost would be thwarted by the delay occasioned in implementing the 9-5-1 plan # 3 at this time. Further testimony revealed that

at this point, *any* change in the electoral scheme would necessitate a separate city election at considerable expense to the City.[2]

This Court, in considering the best interests of the voters of the City, finds that the election should proceed as scheduled. Holding the election on a timely basis will result in the highest possible voter turnout, the least voter confusion, and a savings to the City of approximately $350,000. Therefore, the Court finds that 9-5-1 plan # 2 is the best option available at this time.

The Court stresses that it is implementing 9-5-1 plan # 2 as interim relief only. The question of what council structure would best satisfy § 2 of the Voting Rights Act for a permanent plan is not at issue. *Watkins* at 806.

CONCLUSION

While the Court recognizes the last minute efforts of all parties to reach a compromise, those unsuccessful efforts have now required this Court to address the foregoing options with regard to the November 5, 1991 elections. As in *Watkins*, this Court exercises its equitable power to insure a timely election, as the voters of the City of Houston should not be placed at a disadvantage by legal or political maneuvering. All voting for the November 5,

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[2] The City Secretary testified that the cost of a separate city election is approximately $750,000. For the city to hold its election jointly with the state, the cost is $400,000.

1991 elections must proceed timely and can do so *only* under an interim use of 9-5-1 plan # 2.

Based on the foregoing, with respect to an interim plan, the Court

ORDERS that:

(1) Plaintiffs' request for preliminary injunction is GRANTED to the following extent: the City of Houston is ENJOINED from using 9-5-1 plan # 1 (the existing 9-5-1 plan) to conduct the November 5, 1991 City elections;

(2) 9-5-1 plan # 2 is to be utilized as an interim plan to enable the November 5, 1991 elections to proceed. Those persons elected in the November 5, 1991 City Council election shall hold office until their successors are elected under a permanent apportionment plan (9-5-1 plan # 3 or otherwise) which complies with the Voting Rights Act and the United States Constitution.

Additionally, based upon the plaintiffs' objection to the 16-1 referendum, it is further ORDERED that the 16-1 referendum shall not appear on the November 5, 1991 ballot.

All other interim relief not specifically granted herein is denied.

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c (1988):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in

contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.